Filed 1/7/11 In re M.H. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.H., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. S.B. et al., Defendants and Appellants.	E051205 (Super.Ct.No. RIJ108865) OPINION

APPEAL from the Superior Court of Riverside County. Matthew Perantoni, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant S.B.

Michael D. Randall, under appointment by the Court of Appeal, for Defendant and Appellant J.H.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

A juvenile court terminated the parental rights of appellants J.H. (father) and S.B. (mother) as to their child, M.H. (the child). On appeal, father claims: 1) his due process rights were violated when he allegedly received new counsel on the day of the Welfare and Institutions Code[1] section 366.26 hearing; and 2) there was insufficient evidence to support a finding that the child was likely to be adopted. Mother filed a letter brief joining in and adopting the arguments set forth by father, insofar as they benefit her interests. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 16, 2009, the Riverside County Department of Public Social Services (the department) filed a section 300 petition on behalf of the child. The petition alleged that the child came within the provisions of section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). Specifically, the petition alleged that during her pregnancy, mother had failed to obtain prenatal care and was noncompliant with her diabetes medication. Father knew that mother failed to receive adequate medical care and failed to protect the child. Furthermore, the petition alleged that mother had received reunification services in regard to five of her other children, but had failed to benefit from

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

them, resulting in the termination of her parental rights as to those children.[2] Father was offered services in regard to one of those children and failed to benefit from the services. In addition, it was alleged that five of the child's siblings had been abused and/or neglected. The juvenile court detained the child in foster care.

On December 8, 2009, an amended section 300 petition was filed, which added the allegation that mother had an extensive history of abusing controlled substances. She also had a criminal arrest history of drug-related charges.

That same day, the social worker filed a jurisdiction/disposition report. The social worker recommended that the child be declared a dependent of the court and that mother and father (the parents) be denied reunification services, since they had both had services and/or their parental rights terminated, and had not subsequently made a reasonable effort to treat the problems that led to the removal of the child's siblings. The social worker also reported that, as of December 3, 2009, the parents had not arranged to visit the child, even though they were authorized to have supervised visitation.

A contested jurisdictional hearing was held on February 16, 2010. Both parents appeared in court represented by their respective appointed counsel. The juvenile court found that the child came within section 300, subdivisions (b) and (j), and adjudged the child a dependent of the court. The juvenile court denied reunification services under

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[2] Mother had six children, in addition to the child who is the subject of this appeal. At the time the section 300 petition was filed in regard to this child, mother's parental rights as to the other five children had been terminated. Mother's parental rights as to the sixth child, M.B., were subsequently terminated on February 16, 2010.

Father's only children were the child at issue in this appeal and M.B.

section 361.5, subdivision (b)(10) and (b)(11), and set a section 366.26 hearing for June 17, 2010.

The social worker filed a section 366.26 report on June 4, 2010, recommending the termination of parental rights and adoption as the permanent plan. The social worker further recommended that the child remain in her current placement. She had been placed there since birth, and the caretakers had provided her with excellent care and a loving and safe home. The child was thriving in their home. She was a healthy and happy baby, who was reaching her developmental milestones in a timely manner. She was bonded with the prospective adoptive parents, and they wanted to adopt her.

The section 366.26 hearing was held on June 17, 2010. Mother's attorney, Gareit Becker, appeared on behalf of mother and specially appeared on behalf of father's counsel for father. Attorney Becker represented that both parents objected to the termination of parental rights and argued that the sibling relationship exception (§ 366.26, subd. (c)(1)(B)(v)) applied. The juvenile court found it likely that the child would be adopted and it terminated parental rights.

ANALYSIS

I. Father Was Not Prejudiced by Mother's Counsel's Special Appearance At the Section 366.26 Hearing

Father makes various claims that center around mother's counsel's special appearance on behalf of his counsel at the section 366. 26 hearing. Father does not assert that he received ineffective assistance of counsel from his attorney or the specially appearing attorney. Instead, he claims that by adopting the practice of having another

attorney appear for her, father's attorney "[f]or all practical purposes, . . . essentially withdrew from representing him." He relies on section 317, subdivision (d), to assert that his counsel failed to seek a substitution of counsel or a continuance. (*In re Malcolm D.* (1996) 42 Cal.App.4th 904, 918 (*Malcolm D.*).) He then contends that he needed separate counsel to assert his rights. Father requests this court to reverse the juvenile court's order terminating his parental rights. We conclude that father was not prejudiced by mother's counsel's special appearance.

Section 317, subdivision (a)(1), provides: "When it appears to the court that a parent or guardian of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section." Section 317, subdivision (d), provides: "The counsel appointed by the court shall represent the parent, guardian, or child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent, guardian, or child unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent, guardian, or the child in termination proceedings . . . ."

The record indicates that mother's counsel made a special appearance for father's counsel. A special appearance denotes "an appearance at a hearing by one attorney at the request and in the place of the attorney of record." (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444, fn. 2 [Fourth Dist., Div. Two].) An attorney making a special appearance "represent[s] the client's interests and has a professional attorney-client relationship with the client." (*Id.* at p. 446.) The specially appearing attorney here was

mother's attorney. She was thoroughly familiar with the case and able to competently represent father. Thus, the record indicates that father's counsel did not withdraw from representing him or leave him unrepresented, as father claims. Rather, father's counsel requested mother's counsel to appear in her place. There was no requirement under section 317, subdivision (d), that father's counsel request a substitution of counsel or a continuance.

After claiming in his opening brief that his counsel should have sought a substitution of counsel or a continuance, father claims in his reply brief that it was "incumbent upon the juvenile court" to either continue the case for appointed counsel to appear, or to appoint new counsel. In support of this claim, he cites section 317, subdivision (d), again, *Malcolm D., supra*, 42 Cal.App.4th at p. 918, and *People v. Shelley* (1984) 156 Cal.App.3d 521, 530 (*Shelley*). Father's reliance on these authorities is misplaced. Section 317, subdivision (d), does not require the juvenile court to do anything. (§ 317, subd. (d).) *Malcolm D., supra*, 42 Cal.App.4th 904, concerns a mother who could not be located for the section 366.26 hearing and whose counsel consequently requested to be relieved. (*Id.* at p. 914-916.) In *Shelley*, *supra*, 156 Cal.App.3d 521, the defendant's attorney refused to participate during the defendant's trial, and the court allowed the defendant to proceed without counsel. (*Id.* at pp. 529-530.) This criminal case has nothing to do with juvenile dependency.

Father also contends that he could not have had a meaningful section 366.26 hearing in his appointed counsel's absence, since several of his rights were "sacrificed," including his right to present evidence, rebut evidence against him, cross-examine

witnesses, ensure that he receive a timely copy of the section 366.26 report, and argue on his own behalf. He further asserts that he should have had separate counsel, and speculates that such counsel would have likely sought a continuance to prepare a defense, and would have requested that father be included in the mediation to establish postadoption contact with the child. In his reply brief, father asserts that the juvenile court did order mediation, but excluded him. However, the record reflects that counsel for the department asked the juvenile court to "give the mediator an opportunity to work with *all* the parties," and the juvenile court referred the matter for a post adoption agreement. The specially appearing attorney agreed with the referral for mediation.

Assuming arguendo that father's statutory right to representation under section 317, subdivision (d), was violated, he must show there was a reasonable probability of a more favorable outcome if he had been represented by separate counsel at the hearing. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1634, fn. 9.) Father has failed to demonstrate that he was prejudiced by the special appearance. He makes claims such as his right to "rebut evidence against him" was "sacrificed," and he had "a dignity interest in being able to tell his side of the story using separate counsel." However, these claims are meritless. "The selection and implementation hearing under section 366.26 takes place after the juvenile court finds that the parents are unfit and the child cannot be returned to them." (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.) At that point in the dependency proceedings, the focus shifts from the parents' interest in reunification to the child's interest in a stable and permanent placement. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Furthermore, the circumstances of this case make it clear that the juvenile court would have terminated parental rights whether or not father's original counsel represented him or if he had substitute counsel. The juvenile court was amply justified in deciding that the child was adoptable. (See *post*, § II.) "If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) Before a court may find an exception to adoption for an otherwise adoptable child, a parent must establish a "compelling reason for determining that termination would be detrimental to the child" under one of the exceptions listed in section 366.26, subdivision (c)(1). (§ 366.26, subd. (c)(1)(A), (c)(1)(B)(i)-(vi).) None of father's claims fall within the statutory exceptions.

In sum, father has not demonstrated that he was prejudiced by the special appearance, and he has not established any reason for determining that termination of his parental rights was detrimental to the child.

II. The Juvenile Court Properly Found That the Child Was Adoptable

Father contends that the juvenile court's finding of adoptability was "premature," and that we should, therefore, reverse the juvenile court's order terminating his parental rights. We disagree.

"The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. [Citations.] In making this determination, the juvenile court must focus on the child, and whether the child's age, physical condition, and emotional state may make it

difficult to find an adoptive family." (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400.) "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650 (*Sarah M.*).) "In reviewing the juvenile court's order, we determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the child] was likely to be adopted within a reasonable time. [Citations.]" (*In re Erik P.*, at p. 400.)

There was substantial evidence to support the juvenile court's finding of adoptability. The child was a happy and physically healthy baby, who slept well, ate well, and was "very easy going." She smiled a lot and liked to play with her toys.

Moreover, by the time of the section 366.26 hearing, the child had lived with the prospective adoptive parents for virtually her entire life. She was placed with them a week after she was born. She was seven months old at the time of the section 366.26 hearing. The prospective adoptive parents had demonstrated their ability to meet the social, emotional, and physical needs of the child. The social worker observed that the prospective adoptive parents had done an "outstanding job" making the child a part of their family, and that there was a mutual parent/child bond. The prospective adoptive

parents were ready, willing, and able to adopt the child. They are not likely to be dissuaded.

Father points out that there was no evidence of any other families, aside from the prospective adoptive parents, who would be willing to adopt the child within a reasonable time. However, to be considered adoptable, "it is not necessary that the [child] already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*Sarah M., supra*, 22 Cal.App.4th at p. 1649.)

Father also asserts that the prospective adoptive father had lost his job as a plumber several months prior to the writing of the adoption assessment report, and that he now worked as a handyman. Father notes that the prospective adoptive mother worked as a tutor and a nanny, and that the couple lived in a $700,000 home. He questions how the couple "would continue to make ends meet." In addition, he states that the couple's fingerprint check for criminal/child abuse records was still pending. A section 366.26 hearing "does not provide a forum for the minors' parent to contest the 'suitability' of a prospective adoptive family." (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844.) "[Q]uestions concerning the 'suitability' of a prospective adoptive family are irrelevant to the issue whether the minors are likely to be adopted. General suitability to adopt is a subjective matter which does not constitute a legal impediment to adoption." (*Ibid*.) Father's questions concerning the prospective adoptive parents' financial status and pending criminal records check results are irrelevant to the finding of adoptability.

We conclude that the juvenile court properly found clear and convincing evidence that the child was adoptable.

DISPOSITION

The order is affirmed.

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HOLLENHORST
Acting P.J.

We concur:

McKINSTER
J.

KING
J.